MOTION FILED
APR 2 1984

(3) (3)

Nos. 83-1013 and 83-1373

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ROBIN S. CONRAD
Counsel of Record

STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the amicus curiae
Chamber of Commerce
of the United States

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

20 pp

BEST AVAILABLE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-1013 and 83-1373

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Chamber of Commerce of the United States hereby moves for leave to file the attached brief *amicus curiae* in support of the petition for certiorari in this case pursuant to Supreme Court Rule 36.1. This motion is necessary because the respondent, Natural Resources Defense Council, Inc., declined to consent to the filing of the brief. The petitioners, Chemical Manufacturers Associa-

tion, *et al.* and the Environmental Protection Agency, have consented to the filing.[1]

This case arose out of the Environmental Protection Agency's ("EPA" or "Agency") regulations governing the establishment of "fundamentally different factors" ("FDF") variances from national pretreatment standards. 40 C.F.R. § 403.13 (1983). The issue presented in this case involves a critical question of statutory construction which goes to the very heart of how EPA administers the Clean Water Act ("CWA" or "Act"), 33 U.S.C. § 1251 (1978), that is whether § 301(*l*) of the CWA, 33 U.S.C. § 1311(*l*), prohibits EPA from granting FDF variances for any toxic pollutant.

The scope of this issue extends beyond industries covered by pretreatment standards ("indirect dischargers") promulgated by EPA under § 307(b) of the CWA, 33 U.S.C. § 1317(b), and is of interest to all industries regulated by the CWA. The Third Circuit's holding that EPA is prohibited from issuing such variances has a pronounced effect upon industries covered by effluent guidelines ("direct dischargers") promulgated under § 304(b) of the CWA as well. 33 U.S.C. § 1314(b).

The Chamber of Commerce of the United States ("Chamber") is the largest federation of business organizations and individuals in the United States. Chamber membership exceeds 200,000, including over 195,000 corporations, partnerships and proprietorships as well as over 3,900 trade associations, and local and state chambers. The Chamber regularly presents its views before this Court and the lower federal courts.[2]

---

[1] A copy of the Government's consent letter is being filed simultaneously with the attached brief. Counsel for the Chemical Manufacturers Association has consented orally to the filing.

[2] *See, e.g., Trans World Airlines, Inc.* v. *Thurston*, 713 F.2d 940 (2d Cir. 1983), *cert. granted*, 52 U.S.L.W. 3625 (U.S. Feb. 27, 1984) (No. 83-997), *Bowen* v. *U.S. Postal Service*, —— U.S. ——, 74 L.Ed.2d 402 (1983); *Amoco Production Co.* v. *NLRB*, 613 F.2d 107 (5th Cir. 1980).

Both pretreatment standards and effluent guidelines apply to twenty-one major industries and cover sixty-five priority or "toxic" pollutants or groups of pollutants. Many of the Chamber's member companies belong to these industrial groups and are subject to EPA regulation through pretreatment standards and effluent guidelines. Representative industries include coal companies, iron and steel manufacturers and petroleum refineries.

As the principal voice of the American business community, the Chamber is well-suited to present the broad interest of industry in this case. The decision of the Third Circuit to strike down the use of FDF variances for toxic pollutants in this case has a significant impact upon the membership of the Chamber and the industrial community as a whole.

The Chamber believes it is important for this Court to recognize the significance of this issue to industry in general. It is for this reason that the Chamber respectfully requests leave to file the attached brief.

Respectfully submitted,

ROBIN S. CONRAD
Counsel of Record

STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Counsel for the amicus curiae
Chamber of Commerce
of the United States

TABLE OF CONTENTS

	Page
STATEMENT OF INTEREST	1
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. THE ISSUES RAISED IN THIS CASE ARE CRITICAL TO THE DEVELOPMENT OF INDUSTRY-WIDE REGULATIONS UNDER THE CLEAN WATER ACT	5
A. FDF Variances Have Become an Established Agency Mechanism for Regulating Atypical Industrial Dischargers	5
B. FDF Variances Remedy the Application of Ill-Suited Regulations to Unsampled Plants	7
II. THE THIRD CIRCUIT'S INTERPRETATION OF SECTION 301 (*l*) OF THE CLEAN WATER ACT CREATES AN IRRECONCILABLE CONFLICT IN THE CIRCUITS AND UNDERMINES A PRIOR DECISION OF THIS COURT	8
A. This Case Presents a Critical Question of Statutory Construction Which Affects All Requirements of § 301, Not Just Pretreatment Standards	8
B. There Is No Radical Difference Between Direct and Indirect Dischargers for the Purposes of Developing Industry-Wide Regulations	10
CONCLUSION	11

TABLE OF AUTHORITIES

CASES — Page

Appalachian Power Co. v. *Train*, 620 F.2d 1040 (4th Cir. 1980) — 2, 8, 9
CBE v. *Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983) — 7, 8
EDF v. *Costle*, 636 F.2d 1229 (D.C. Cir. 1980) — 5, 6
E.I. duPont de Nemours & Co. v. *Train*, 430 U.S. 112 (1977) — 2, 7, 10, 11
EPA v. *National Crushed Stone Association*, 449 U.S. 64 (1980) — 16
Kennecott Copper Corp. v. *EPA*, 612 F.2d 1232 (10th Cir. 1979) — 7
NRDC v. *EPA*, 537 F.2d 642 (2d Cir. 1976) — 7
NRDC v. *Train*, 8 ERC 2120 (D.D.C. 1976), *modified sub nom. NRDC* v. *Costle*, 12 ERC 1833 (D.D.C. 1979), *modified sub nom. NRDC* v. *Gorsuch*, 12 ELR 20570 (D.D.C. 1982), *modified sub nom. NRDC* v. *Ruckelshaus*, 14 ELR 20185 (D.D.C. 1984) — 3, 6
Weyerhaeuser Co. v. *Costle*, 590 F.2d 1011 (D.C. Cir. 1978) — 7, 10, 11

STATUTES

Clean Water Act

33 U.S.C. § 1251 (1978) — 3
33 U.S.C. § 1311(b)(1)(A) (1978) — 3, 9
33 U.S.C. § 1311(b)(2)(A) (1978) — 3
33 U.S.C. § 1311(b)(2)(A)(i) (1978) — 3, 9
33 U.S.C. § 1311(b)(2)(A)(ii) (1978) — 3, 9
33 U.S.C. § 1311(c) (1978) — 8
33 U.S.C. § 1311(g) (1978) — 8
33 U.S.C. § 1311(*l*) (1978) — 2, 5, 8, 9
33 U.S.C. § 1314(b) (1978) — 3, 4
33 U.S.C. § 1317(b) (1978) — 3

REGULATIONS

40 C.F.R. § 125.30 (1983) — 4, 6
40 C.F.R. § 403.13 (1983) — 4, 6

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS — Page

H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess., *reprinted in* 1977 U.S. Code Cong. and Ad. News, 4424, 4459 — 9
48 *Fed. Reg.* 46944 (1983) — 8
49 *Fed. Reg.* 5131 (1984) — 4, 10

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

Nos. 83-1013 and 83-1373

CHEMICAL MANUFACTURERS ASSOCIATION, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

U.S. ENVIRONMENTAL PROTECTION AGENCY,
Petitioner,

v.

NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*,
Respondents.

BRIEF AMICUS CURIAE OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STATEMENT OF INTEREST

The Chamber of Commerce of the United States ("Chamber") respectfully refers this Court to its Motion for Leave to File Brief Amicus Curiae for a statement of the Chamber's interest in this proceeding.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Third Circuit holds that § 301(*l*) of the Clean Water Act prohibits FDF variances for toxic pollutants. This decision is fundamentally at odds with *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (4th Cir. 1980), and conflicts in principal with the decision of this Court in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). By eliminating the flexibility this Court found so crucial to setting industry-wide regulations under the Clean Water Act, the Third Circuit decision calls into question the legality of existing regulations and the ability of future regulations to be fully representative of industry as a whole.

The Third Circuit's sweeping misinterpretation of section 301(*l*) of the Clean Water Act goes to the very heart of how the Environmental Protection Agency ("EPA") develops industry-wide regulations for all industrial dischargers, not just those subject to pretreatment standards. The Third Circuit decision not only invalidates the use of FDF variances from pretreatment standards, but also jeopardizes the use of FDF variances generally, thereby threatening EPA's entire regulatory scheme under the Act.

ARGUMENT

The Environmental Protection Agency ("EPA" or "Agency") regulates two types of industrial dischargers under the Clean Water Act ("CWA" or "Act"). 33 U.S.C. § 1251 (1978). Industries that discharge wastewater directly into waters of the United States ("direct dischargers") are subject to effluent limitations guidelines promulgated under § 304(b) of the CWA. 33 U.S.C. § 1314(b). Industries that discharge into publicly-owned treatment works ("indirect dischargers") are subject to pretreatment standards promulgated under § 307(b) of the Act. 33 U.S.C. § 1317(b).

Both effluent limitations guidelines ("effluent guidelines" or "guidelines") and pretreatment standards are requirements of § 301 of the CWA, 33 U.S.C. § 1311 (b)(2)(A)(i) and (ii), and are based on two levels of water pollution control technology. By July 1, 1977, direct dischargers had to achieve effluent limitations based on the "best practical control technology currently available ("BPT")." 33 U.S.C. § 1311(b)(1)(A). By July 1, 1984, direct dischargers will have to achieve effluent limitations based on the "best available technology economically achievable ("BAT")." 33 U.S.C. § 1311(b)(2)(A).

Although not required by statute, EPA and the respondent, Natural Resources Defense Council, Inc. ("NRDC"), adopted in a consent decree the BPT/BAT approach for developing pretreatment standards for indirect dischargers. *NRDC* v. *Train*, 8 ERC 2120 (D.D.C. 1976), *modified sub nom. NRDC* v. *Costle*, 12 ERC 1833 (D.D.C. 1979), *modified sub nom. NRDC* v. *Gorsuch*, 12 ELR 20570 (D.D.C. 1982), *modified sub nom. NRDC* v. *Ruckelshaus*, 14 ELR 20185 (D.D.C. 1984). ("the NRDC Consent Decree"). EPA has developed pretreat-

ment standards according to this BPT/BAT approach since 1977.[1]

EPA develops effluent guidelines and pretreatment standards on an industry-wide basis according to specified statutory factors required by § 304(b)(2)(B) of the Act for developing effluent guidelines. 33 U.S.C. § 1314(b)(2)(B). These factors include the age of the equipment and facilities involved, the process employed, the engineering aspects of pollution control techniques, energy impacts and the cost of required effluent reductions but not the ability to pay that cost.

Prior to the decision below, any individual discharger could demonstrate factors "fundamentally different" from those EPA considered when developing industry-wide regulations, including pretreatment standards, and receive an "FDF variance" from those regulations. To apply for a FDF variance from an effluent guideline, a direct discharger would follow the procedures set forth in § 125.30 of the National Pollutant Discharge Elimination System ("NPDES") permit regulations. 40 CFR § 125.30 (1983). To apply for a FDF variance from a pretreatment standard, an indirect discharger would follow the procedures set forth in § 403.13 of the General Pretreatment Regulations. 40 CFR § 403.13 (1983).

The Third Circuit now has invalidated the use of FDF variances for toxic pollutants and remanded the pretreatment variance to the Agency. A-43. In compliance with the lower court decision, EPA has amended § 403.13 of the General Pretreatment Regulations to "make clear that the pretreatment FDF variance provision is not available for toxic pollutants." 49 *Fed. Reg.* 5131, 5132 (1984). Immediate review by this Court is required to

[1] Congress incorporated this consent decree by reference and thereby endorsed this approach to setting effluent guidelines and pretreatment standards in the 1977 Amendments to the Clean Water Act.

resolve the conflict this decision creates in the circuits and to remedy the harm caused by the remand.

I. THE ISSUES RAISED IN THIS CASE ARE CRITICAL TO THE DEVELOPMENT OF INDUSTRY-WIDE REGULATIONS UNDER THE CLEAN WATER ACT

A. FDF Variances Have Become an Established Agency Mechanism for Regulating Atypical Industrial Dischargers.

Section 301(*l*) of the CWA provides that "the Administrator may not modify any requirement of this section as it applies to any specific pollutant which is on the toxic pollutant list under section 307(a) of this Act."[2] 33 U.S.C. 1311(*l*). In the decision below, the Third Circuit broadly interprets § 301(*l*) and holds that "FDF variances for toxic pollutant discharges are forbidden by the Act." A-43. This sweeping interpretation of § 301(*l*) extends beyond the scope of the General Pretreatment Regulations challenged below and calls into question the validity of FDF variances from effluent guidelines as well.

EPA develops all industry-wide regulations, including pretreatment standards, by combining categorical standards with the opportunity for individual dischargers within each category to apply for a FDF variance. The availability of FDF variances to fundamentally different individual dischargers is an integral part of developing industry-wide regulations and has become an established Agency practice in regulating both direct and indirect dischargers. The decision below to prohibit the use of FDF variances for toxic pollutants critically affects EPA's entire regulatory scheme under the Clean Water

[2] This list was developed by EPA and NRDC as part of the consent decree cited above. *See EDF v. Costle*, 636 F.2d 1229, 1234 (D.C. Cir. 1980).

Act and thereby is of vital concern to virtually all industrial dischargers, not just those subject to the pretreatment regulations challenged below.

For the purposes of developing industry-wide regulations, there is no radical difference between effluent guidelines and pretreatment standards. EPA develops effluent guidelines and pretreatment standards at the same time for twenty-one major industries,[5] covering sixty-five "priority" or toxic pollutants or groups of pollutants. Although the Act is silent on how pretreatment standards should be set, EPA regulates direct and indirect dischargers analogously, based on the same levels of control technology and according to the same technology-based criteria specified by statute for effluent guidelines and agreed to in the NRDC Consent Decree. *EDF* v. *Costle*, 636 F.2d at 1235.

FDF variances are available to both direct and indirect dischargers and thereby play an important role in the development of industry-wide regulations under the Clean Water Act. The availability of variances for facilities that are fundamentally different from those considered by EPA when developing an industry-wide regulation ensures that similar facilities will be subject to similar treatment. Fair and equitable treatment is essential, especially to individual facilities that EPA overlooked during the national rulemaking process.[6]

---

[5] The number of industrial categories for which EPA must promulgate BAT toxic standards has changed over the years as a result of a series of modifications to the NRDC Consent Decree. *See supra* text accompanying note 1. In January 1984, BAT standards for nine categories were yet to be promulgated. *NRDC* v. *Ruckelshaus*, 14 ELR 20185 (D.D.C. 1984).

[6] EPA continually acknowledges through regulation and in pleadings that it may overlook or fail to include factors relevant to a few plants, but not to the industry at large. 40 C.F.R. §§ 125.30, 403.13.

B. FDF Variances Remedy the Application of Ill-Suited Regulations to Unsampled Plants.

The role of FDF variances in setting effluent guidelines has been upheld by this Court in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977), and hailed by lower federal courts as "an administrative safety valve" which "permits a more rigorous adherence to an effective regulation." *NRDC* v. *EPA*, 537 F.2d 642, 647 (2d Cir. 1976) (*quoting Portland Cement Association* v. *Ruckelshaus*, 486 F.2d 375, 399 (D.C. Cir. 1973), *cert. denied*, 417 U.S. 921 (1979). The availability of FDF variances has helped to expedite EPA's enormously complex task of developing effluent guidelines and pretreatment standards for the 60,000 industrial dischargers regulated under the CWA.[7]

"The sheer number of point sources potentially subject to regulation and the rapidly approaching statutory deadlines required EPA to restrict itself in the regulation promulgation process to a representative sampling of plants." *NRDC*, 537 F.2d at 647. By coupling the promulgation of national standards with the opportunity to apply for a FDF variance, EPA can regulate these dischargers by industrial category rather than individually. Moreover, without a FDF variance provision, there is no guarantee that EPA could effectively remedy defects resulting from the application of "ill-suited" regulations to "unsampled individual plants." *Id.*

FDF variances also have helped both sets of industry-wide regulations survive legal challenges[8] and have been used as a bargaining device by the Agency to convince

---

[7] The difficulty EPA has had with complying with its statutory mandate in a timely manner is well-documented. *See supra* text accompanying note 1. *See also CBE* v. *Gorsuch*, 718 F.2d 1117 (D.C. Cir. 1983).

[8] *Kennecott Copper Corp.* v. *EPA*, 612 F.2d 1232, 1244 (10th Cir. 1979). *See Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011 (1978).

industry not to challenge regulations.[7] Invalidating FDF variances at this stage of developing guidelines and standards is disruptive, confusing and likely to provoke recurring litigation over the ability of existing regulations to address the atypical plants not previously considered. Without a variance clause to address atypical situations, future regulations also may be the subject of protracted litigation. Quick resolution of this issue will avoid needless litigation expenses on the part of all parties and reduce litigation burdens on the lower courts.

II. THE THIRD CIRCUIT'S INTERPRETATION OF SECTION 301(*l*) OF THE CLEAN WATER ACT CREATES AN IRRECONCILABLE CONFLICT IN THE CIRCUITS AND UNDERMINES A PRIOR DECISION OF THIS COURT.

A. This Case Presents a Critical Question of Statutory Construction Which Affects All Requirements of § 301, Not Just Pretreatment Standards.

In ruling that section 301(*l*) prohibits FDF variances for toxic pollutants, the Third Circuit rejects the identical arguments presented by EPA and accepted by the Fourth Circuit in *Appalachian Power Co.* v. *Train*, 620 F.2d 1040 (1980). In both cases, EPA argued that § 301(*l*) was intended to apply only to specific sections of § 301, specifically § 301(e) and (g). 33 U.S.C. §§ 1311(e) and (g). *See CBE*, 718 F.2d at 1238 n.36. EPA also argued that a FDF variance does not relieve a discharger from complying with § 301. Rather, the FDF variance process subjects an individual discharger to a more appropriate § 301 standard by using data that was

[7] *See* 48 *Fed. Reg.* 46944, 46945-6 (1983) (Proposed regulations to implement settlement agreement resolving all legal challenges to effluent guidelines and pretreatment standards for the iron and steel point source category).

not available during the national rulemaking process. *Appalachian Power*, 620 F.2d at 1047.

In *Appalachian Power*, the Fourth Circuit squarely addressed the same issue and arguments presented below, but held that § 301(*l*) did not apply to FDF variances for toxic pollutants from BPT limitations. These two circuit court decisions cannot be reconciled. The Third Circuit itself expressly states that it "must disagree" with the Fourth Circuit's decision. A-43.

Both circuits frame the issue in general terms, without regard to levels of technology. The Fourth Circuit described the issue before it as whether § 301(*l*) "prohibits EPA from modifying *any of* § *301*. . . , including BPT limitations, *for toxic pollutants*." 620 F.2d at 1042 (emphasis added). Similarly, the Third Circuit states the issue below as whether "variances for toxic pollutants are forbidden by section 301(*l*) of the Act." A-40. Any contention that these decisions can be reconciled is without merit.

The fact that the FDF variance at issue in *Appalachian Power* was from a BPT effluent guideline does not reconcile this conflict in the circuits. The pretreatment standard at issue below and the BPT limitation at issue in *Appalachian Power* both apply to toxic pollutants on the § 307(a) list. 620 F.2d at 1047. Nor does § 301(*l*) distinguish between levels of technology.

Moreover, § 301(*l*) does not distinguish between effluent guidelines or pretreatment standards. Rather, § 301(*l*) expressly applies to "*any requirement* of [section 301]." (emphasis added). Pretreatment standards are just as much requirements of § 301 as are BPT and BAT effluent limitations. (A-41). See 33 U.S.C. §§ 1311(b)(1)(A), (b)(2)(A)(i) and (ii). *See also* H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 84, *reprinted in* 1977 U.S. Code Cong. & Ad. News 4424, 4459.

This inconsistent treatment by two courts of appeals of the same issues and arguments presented by the same parties creates a clear conflict in the circuits which can be resolved only by this Court's review. Moreover, as previously noted, the Third Circuit has remanded the pretreatment FDF variance provision and ordered EPA to revise the General Pretreatment Regulations to conform with this disparate ruling. A-43. EPA so revised § 403.13(b)(2) on February 10, 1984. 49 *Fed. Reg.* (1984). Accordingly, this Court should grant the petitions for review.

B. There Is No Radical Difference Between Direct and Indirect Dischargers for the Purposes of Developing Industry-Wide Regulations.

The decision below also is contrary in principal to the decision of this Court in *E.I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112 (1977). In *duPont*, this Court blessed EPA's regulatory scheme of allowing FDF variances from industry-wide effluent guidelines. This Court held that "the CWA authorizes the 1977 BPT limitations *as well as the [1984] BAT limitations* to be set by regulation, *so long as some allowance is made for variations in individual plants*, as EPA has done by including a variance clause in its 1977 limitations." 430 U.S. at 128 (emphasis added). Subsequent decisions have interpreted *duPont* as requiring FDF variances. *EPA* v. *National Crushed Stone Association*, 449 U.S. 64, 72 (1980); *Weyerhaeuser Co.* v. *Costle*, 590 F.2d 1011, 1031 (D.C. Cir. 1978).

In authorizing FDF variances from effluent guidelines, this Court in *duPont* stated that nothing in the CWA "suggests any radical difference in the mechanism use to impose limitations for [BPT] and [BAT]." 430 U.S. at 127. As demonstrated above, there also is no radical difference in the approach EPA uses to develop effluent guidelines and pretreatment standards.

FDF variances are as essential to the development of pretreatment standards as they are to effluent guidelines. Pretreatment standards, like effluent guidelines, are industry-wide regulations for which some allowances for individual variations must be made. The Chamber respectfully submits that the rationale in *duPont* should extend to pretreatment standards as well. Any time EPA sets industry-wide regulations, allowances also must be made for variations in individual plants, as EPA did by including FDF variances from industry-wide pretreatment regulations. The importance of administrative flexibility in ensuring fair and equitable treatment of *all* industrial dischargers weighs heavily in favor of this Court's granting review here.

CONCLUSION

The Third Circuit decision to prohibit FDF variances for toxic pollutants extends beyond the pretreatment regulations challenged below and has a profound effect upon all industries regulated under the Clean Water Act. By prohibiting the use of FDF variances for toxic pollutants from pretreatment standards, the Third Circuit creates an irreconcilable conflict in the circuits and eliminates any allowance for individual plants, as required by this Court in *duPont*.

By eliminating the "flexibility that *duPont* deemed crucial to the legality of *any set of industry-wide effluent limitation* under the Act," the Third Circuit decision calls into question the legality of existing regulations and the ability of future regulations to fully represent industry as a whole. *Weyerhaeuser*, 590 F.2d at 1033 (emphasis added). The Chamber of Commerce urges this Court to reconcile this conflict in the circuits so that further litigation may be avoided. Accordingly, we respectfully request this Court to grant the petitions for certiorari filed

by the Chemical Manufacturers Association and the Environmental Protection Agency.

Respectfully submitted,

ROBIN S. CONRAD
Counsel of Record

STEPHEN A. BOKAT
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337
Counsel for the amicus curiae
Chamber of Commerce
of the United States